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NO. 83-1634

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

HAROLD V. SIMPSON & COMPANY, Petitioner

VS.

RONALD WILLIAM SHULER, Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Harold V. Simpson & Co. filed suit in a Texas County Court at Law against Ronald W. Shuler based on a sworn account for services rendered to Shuler incident to the preparation of his tax returns. In addition to the usual pleadings to support recovery on the debt (sworn account), the plaintiff's attorney deftly included some additional pleadings tracking the language of 11 USC 523 (a)(2)(A). The pleadings were conclusory and pled no facts upon which the plaintiff Simpson relied to show false pretenses, false representations, or actual fraud. Simpson's case being adequately pled on the sworn account, the additional fraud pleadings were not necessary to Simpson's recovery.

Shuler did not answer Simpson's suit, or otherwise appear and defend in any manner. Simpson obtained a judgment by default which recited that Simpson's cause of action was based on a liquidated debt for obtaining by

false pretenses the services furnished. The recitation in the default judgment concerning the false pretenses found its basis only in Simpson's pleadings, and the state trial court received virtually no other evidence on that issue.

Some months later, Shuler filed a petition for relief under Chapter 7 of the Bankruptcy Code. Simpson filed a complaint in the bankruptcy proceeding objecting to the discharge of its debt on the basis that it was one "for obtaining money, property, or services by false pretenses other than a statement respecting financial condition." Upon trial of the complaint before the bankruptcy judge, Simpson relied solely on the "false pretense" recitations of its state court judgment; it offered no evidence to support the false pretense allegations in its complaint, and it offered no evidence that any evidence of that nature was considered by the state court judge. Indeed it did not

because it could not. There was simply no fraud in the case which could be proved in any forum. But if it could raise its illegitimate and completely unfounded pleading to a judgment entitled to the the sanctuary of res judicata, then it would have created the collection lawyer's dream--a whole generation of default judgments which were not dischargeable in bankruptcy, obtained with the ease of the entry on one simple sentence in their word processors. With the financial implications of such a possibility being obvious, so began the trek of Ron Shuler's $800 debt to this court.

SUMMARY OF ARGUMENT

The U.S. Bankruptcy Court has exclusive jurisdiction to determine the dischargeability of a debt in a bankruptcy proceeding. No state court has jurisdiction to determine the issue of dischargeability,

and hence 28 USC 1738 does not extend full faith and credit to any state court judgment to the extent such judgment purports to decide the issue of dischargeability. Being exclusively a creature of federal law, federal preclusion and collateral estopple rules govern the effect of a state court judgment when it is sought to be utilized by any party before the bankruptcy court on the issue of dischargeability.

REASONS FOR DENYING THE WRIT

1. THE DECISION BELOW DOES NOT CONFLICT WITH THE DECISIONS OF THE SUPREME COURT AS TO THE PROPER APPLICATION OF 28 U.S.C. 1738.

The Petitioner cites Allen v. McCurry, 449 U.S. 90, 96 (1980) for the proposition that the federal courts should apply state law in determining the collateral estopple effect of prior state court adjudication. In the Allen case, the state criminal trial court refused, under Fourth and Fourteenth

Amendment challenges, to supress certain evidence seized in a narcotics raid. In a subsequent civil suit against the arresting officers under 42 USCS 1983, this court sustained the District Court's use of collateral estopple to prevent the defendant from relitigating the search-and-seizure question adversly decided against him in the state court.

The difference in the Allen case and the instant case is readily apparent. No citations are necessary for the proposition that both the state and federal courts have jurisdiction to decide Fourth Amendment issues. In this case, however, only the federal courts, have jurisdiction to decide the issue of dischargeability of a debt in bankruptcy. The bankruptcy court has exclusive jurisdiction to decide dischageability questions, and no state court judgment may may stand as a res judicata bar on that issue. Brown v. Felsen, 442 U.S. 127

(1979). Since the dischargeability issue cannot be adjudicated in state court, it is patently ridiculous to apply state law in determining the collateral estopple effect of that which cannot be adjudicated in the state forum. It is not surprising then that the Fifth Circuit applied the federal collateral estopple test to that issue which was exclusively a federal issue.

2. THE DECISION BELOW DOES NOT RAISE SIGNIFICANT AND RECURRING PROBLEMS OF COLLATERAL ESTOPPLE UNDER 28 U.S.C. 1738 IN BANKRUPTCY DISCHARGEABILITY QUESTIONS.

The only recurring and significant problem which the Fifth Circuit's decision raises is that it prevents collection lawyers from taking one the easy way. It forces them to actually prove up their dischargeability case in the bankruptcy court.

The Fifth Circuit's application of collateral estopple fully insures that issues honestly litigated and determined in prior

state court proceedings may be considered by the bankruptcy court in determining dischargeability issues. In appropriate instances the state court judgment may be conclusive. Carey Lumber Co. v. Bell, 615 F.2d 370 (5th. Cir. 1980) The application of federal preclusion and collateral estopple rules requires that the dischargeability issue be fairly addressed, and the application of these rules is consistent with the concept of exclusive federal jurisdiction.

Recognizing this, the Petitioner urges this Court to abandon the exclusive jurisdiction approach it adopted in Brown v. Felsen, supra. We are told that the reasons for exclusive federal jurisdiction are not present today. We are further assured that there is "no danger of abuse in a pre-bankruptcy suit," when it is obvious what kind of abuse Petitioner seeks to achieve with its pre-bankruptcy suit. Absent the

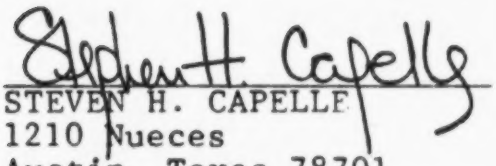
exclusive jurisdiction restraint, unwitting state court judges could determine the dischargeability issue by entering default judgments which parrot completely unfounded fraud pleadings in a petition.

The Fifth Circuit's decision governing the role of a state court default judgment in the determination of the dischargeability of a debt in a bankruptcy proceeding adequately and fairly protects the debtor from the unfounded fraud claim, and insures that the defrauded creditor have his day in court. The parity which presently exists is derived from the exclusive federal jurisdiction in dischargeability questions, and any departure from the exclusive jurisdiction rule would only serve the unscrupulous.

CONCLUSION

For these reasons, a writ of certiorari should not issue to review the judgment of the Fifth Circuit.

RESPECTFULLY SUBMITTED,



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CERTIFICATE OF SERVICE

I hereby certify that on this the 14TH day of June, 1984, three copies of this Brief in Opposition was mailed via First Class U.S. Mail to Don L. Baker, Esq., Baker and Price, 314 West 11th. St., Suite 500, Austin, Texas 78701, Attorney for the Petitioner, and further certify that all parties required to be served have been served.

Stephen H. Capelle

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